UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN THE MATTER OF:	:	**CASE NUMBER**
	:	
ANDERSEN 2000, INC.	:	04-14155-WHD
	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 11 OF THE
DEBTOR.	:	BANKRUPTCY CODE

O R D E R

Before the Court is the Motion for Relief from the Automatic Stay, filed by Endesco Clean Harbors (hereinafter "Endesco") and St. Paul Fire and Marine Insurance Company (hereinafter "St. Paul"), as subrogee of Endesco (collectively, the "Movants"). The Debtor opposes the Motion. Following a hearing, the Court took the Motion under advisement. This matter constitutes a core proceeding, over which this Court has subject matter jurisdiction. *See* 28 U.S.C. § 157(b)(2)(G); § 1334.

BACKGROUND

In 2002, the Debtor contracted to sell and install a processing system at a plant owned by Endesco. On October 15, 2003, a fire damaged property at Endesco's plant. Endesco filed a claim for the loss against its insurance policy, which was paid by St. Paul. In May 2005, Endesco and St. Paul, as Endesco's subrogee, filed a lawsuit in New Jersey state court against the Debtor, RPMS Consulting Engineers, and Norit America, Inc. Endesco's complaint sought damages for fire losses sustained at its plant, which Endesco attributed to the Debtor's negligence in providing the wrong type of carbon for the system installed in Endesco's plant.

On December 20, 2004, the Debtor filed a petition under Chapter 11 of the Bankruptcy Code. Accordingly, when the Debtor received notice of the suit, the Debtor's counsel filed an answer and a notice of suggestion of automatic stay.

On July 26, 2005, this Court approved a settlement between the Debtor and Endesco, which resolved the issue of a claim asserted by the Debtor against Endesco in the amount of at least $345,937. As part of the settlement, Endesco agreed to pay the Debtor $240,000 and "to waive all claims against the Debtor or the Debtor's estate, including but not limited to any proofs of claim filed or scheduled claims . . . ." The settlement agreement further states that:

> The Debtor and [Endesco] hereby release, acquit and forever discharge each other and their respective successors, assigns and agents from any and all claims, counterclaims, rights, demands, obligations, costs, damages, losses, liabilities, attorneys fees, actions, lawsuits and causes of action, of whatsoever kind or nature, known or unknown, fixed or contingent, which either has, had, or may hereafter claim to have, in law or in equity, arising out of any act or omission occurring on or before the date of this Settlement Agreement. [1]

Settlement Agreement, ¶ 4. Counsel for St. Paul was never notified of the settlement between the Debtor and Endesco.

Upon discovering that the Debtor has insurance coverage, the Movants filed the instant motion for relief for automatic stay on December 30, 2005. The Movants seek relief from the automatic stay to permit them to continue litigating the New Jersey state court action. The Debtor opposes the Motion on the basis that any claims that could have been asserted by Endesco against the Debtor were released upon the execution of the settlement agreement. Accordingly, since the Debtor has a complete defense to the suit, the Debtor argues there is no reason to lift

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[1] The Settlement Agreement provides that it will be interpreted under Georgia law.

the stay to permit the litigation to go forward. In response, Movants assert that it would be inequitable for this Court to deny relief from the stay on the basis that St. Paul's subrogation claims are barred by the release granted by Endesco without St. Paul's knowledge.

CONCLUSIONS OF LAW

As a general rule, the filing of a bankruptcy petition operates to stay litigation involving pre-petition claims against a debtor. *See* 11 U.S.C. § 362(a)(1). In this case, the Movants' are effectively seeking retroactive annulment of the automatic stay, as they filed their complaint in May 2005, several months after the Debtor filed its bankruptcy petition. Accordingly, the filing of the complaint was in violation of the automatic stay and, in this jurisdiction, was "void and without effect." *See In re Albany Partners, Ltd.*, 749 F.2d 670, 675 (11th Cir. 1984); *In re Ford*, 296 B.R. 537 (Bankr. N.D. Ga. 2003) (Bonapfel, J.). .

However, the Court can grant a creditor relief from the automatic stay by "terminating, annulling, modifying, or conditioning" the stay. *Id*. § 362(d). Such relief can be granted on a retroactive basis in certain "limited circumstances." *See Albany Partners*, 749 F.2d at 675 (noting that an order terminating the stay would provide relief going forward, while an order annulling the stay would have retroactive effect); *Ford*, 296 B.R. at 556. As a threshold matter, the Court must determine that the movant acted without knowledge of the existence of the automatic stay. *In re Brown*, 251 B.R. 916, 919 (Bankr. M.D. Ga. 2000). In this case, there has been no suggestion made that the Movants filed their complaint against the Debtor with knowledge of the bankruptcy petition. The Debtor scheduled Endesco as a party to an executory contract, but did not include Endesco on the creditor mailing matrix, and, consequently, neither

Endesco nor St. Paul received notice of the bankruptcy filing from the Clerk.

Having made a threshold determination that the Movants lacked knowledge of the bankruptcy case and did not willfully violate the automatic stay, the Court must now consider whether annulling the stay would have a detrimental impact on the Debtor's other creditors. *See Soares*, 107 F.3d 969, 977 (1st Cir. 1997) (noting that, because one of the important purposes of the automatic stay is to insure that creditors share equally in the distribution of the debtor's assets, the court should not retroactively annul the stay if doing so would greatly prejudice the debtor's other creditors); *see also In re Brown*, 251 B.R. 916, 919 (Bankr. M.D. Ga. 2000). . The Court finds no basis to conclude that annulling the stay to permit the Movants to continue the state court litigation would harm the Debtor's other creditors. As noted below, any judgment obtained would not be asserted against the bankruptcy estate, but would be paid by the Debtor's insurer, and there appears to be no great impact on the Debtor's ability to reorganize.

Before annulling the stay, the Court must also conclude that the Court could have lifted the automatic stay to permit the filing of the lawsuit if the Movants had been aware of the bankruptcy case and had filed a motion for relief from the stay prior to filing the complaint in state court. *See In re Ford*, 296 B.R. at 556. Under section 362(d), the automatic stay can be terminated, so long as an interested party can demonstrate "cause." *See* 11 U.S.C. § 362(d)(1) (1996). The Bankruptcy Code does not define "cause," leaving it to the judiciary to ascribe meaning to the term. "What constitutes 'cause' is based on the totality of the circumstances in the particular case." *In re Robertson*, 244 B.R. 880, 882 (Bankr. N.D. Ga. 2000) (citing *Baldino v. Wilson (In re Wilson)*, 116 F.3d 87, 90 (3d Cir. 1997); *Trident Assoc. v. Metro. Life Ins. Co. (In re Trident Assoc.)*, 52 F.3d 127, 131 (6th Cir.1995)); *see also In re Fernstrom Storage and*

Van Co., 938 F.2d 731 (7th Cir. 1991). In determining whether to lift the stay to permit litigation to proceed against the debtor, the Court considers three factors: 1) whether any great prejudice to either the bankruptcy estate or the debtor will result from prosecution of the lawsuit; 2) whether the hardship to the non-debtor party by continuation of the automatic stay considerably outweighs the hardship to the debtor; and 3) whether the movant has a probability of success on the merits of his case. *See Robertson,* 244 B.R. at 882.

As to the first prong, "debtors-defendants suffer little prejudice when they are sued by plaintiffs who seek nothing more than declarations of liability that can serve as a predicate for a recovery against insurers, sureties, or guarantors." *Fernstrom Storage and Van Co*., 938 F.2d at 736. Here, the Movants have asserted that they would only seek to establish liability against the Debtor to the extent of existing insurance coverage. Accordingly, the assets of the Debtor's bankruptcy estate would not be subject to payment for any judgment obtained by the Movants. The Debtor has not disputed the fact that insurance coverage exists to pay any claim that may result from the litigation. The Debtor has also pointed to no reason why permitting the suit to go forward would interfere with the Debtor's ability to operate its business or to complete its reorganization. Presumably, the Debtor's officers or employees may be called upon to provide discovery or testimony during the course of the litigation, but this is not a substantial burden on the Debtor. *See In re Doar*, 234 B.R. 203, 206-07 (Bankr. N.D. Ga. 1999) (Kahn, J.) (the debtor is "not relieved of the responsibility . . . to testify at trial and/or participate in discovery as a witness"); *see also Fernstrom Storage and Van Co.*, 938 F.2d at 736 (noting that lifting the stay would not interfere with the debtor's reorganization because the matter was essentially a "suit between insurance companies").

As to the second prong, the Court finds that the harm of maintaining the stay and prohibiting the Movants from establishing a claim for the purpose of proceeding against available insurance coverage significantly outweighs the harm to the Debtor of minimal participation in the litigation. St. Paul has paid the claim filed by Endesco and, without obtaining stay relief, would not be able to pursue its subrogation rights. This harm is substantially greater than the harm that may befall the Debtor if the stay is lifted.

As to the third prong, the strongest argument against lifting the stay is the Debtor's contention that the Movants' claims were released by the entry of the settlement agreement between the Debtor and Endesco.[2] If the Debtor is correct, the Movants' claims would necessarily fail on the merits, and the third factor would weigh heavily in favor of maintaining the automatic stay. However, the Movants submit that, under New Jersey law, which Movants assert applies to this issue,[3] the settlement agreement could not have released St. Paul's subrogation rights. The Movants also argue that it would be inequitable for this Court, rather than the New Jersey court, to determine the "viability" of the Debtor's defense that the Movants'

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[2] The Movants also assert that the settlement agreement was intended to release only the contractual claims of Endesco against the Debtor and, therefore, did not release Endesco's tort claim. However, since the Court finds there is sufficient basis to conclude that the state court could determine that St. Paul's subrogation rights could not have been released by the settlement agreement, the Court need not interpret the settlement agreement.

[3] The Debtor has not challenged the Movant's statement that New Jersey law applies to this issue. Although the Debtor has raised the point that the settlement agreement contains a choice of law provision, which states that Georgia law governs the interpretation of the settlement agreement, the Court need not interpret the settlement agreement to conclude that such an agreement, as a matter of law, could not abrogate St. Paul's subrogation rights. In any event, the Court need not determine with certainty which state's law applies to this issue, as the result appears to be the same under either New Jersey law or Georgia law. *See Melick v. Stanley*, 174 N.J. Super. 271, 416 A.2d 415 (N.J. Super. Ct. Law Div. 1980); *Vigilant Ins. Co. v. Bowman*, 128 Ga. App. 872, 198 S.E.2d 346 (Ga. App. 1973).

claims have been released by the settlement agreement. The Court disagrees. Because the analysis of whether to terminate the automatic stay requires the Court to review the merits of the claim, the Court must consider the fact that the Debtor may have a full defense to the Movants' claim.

The Movants submit that a release of a claim executed in favor of a tortfeasor does not bar a subsequent subrogation claim against the tortfeasor if the tortfeasor knew or should have known at the time of the release that an insurer had already paid the claim being released and had a subrogation right against the tortfeasor. In support of this statement of the law, the Movants cite several New Jersey cases and several Georgia cases. *See American Reliance Ins. Co. v. K. Hovnanian at Mahwah IV, Inc.*, 337 N.J. Super. 67, 766 A.2d 321 (N.J. App. Div. 2001) ("The rule is well settled that although a release of the tortfeasor by the victim-insured will ordinarily bar the insurer's subsequent assertion of a subrogation claim against the tortfeasor, the tortfeasor is not entitled to that immunization if he was on notice, at the time of the release, that the insurer had already paid the claim and hence had a subrogation right against him."); *Melick v. Stanley*, 174 N.J. Super. 271, 416 A.2d 415 (N.J. Super. Ct. Law Div. 1980) ("A release procured by a tortfeasor, knowing that the insured has already received payment from the insurer, has generally been held not to constitute a defense to the insurer's action against the wrongdoer to enforce its right of subrogation."); *Vigilant Ins. Co. v. Bowman*, 128 Ga. App. 872, 198 S.E.2d 346 (Ga. App. 1973); *USF&G v. Ryder Truck Lines*, 160 Ga. App. 650, 288 S.E. 2d 1 (1991).

Having considered the matter, the Court finds a sufficient basis to conclude that the Debtor's defense of release is at least jeopardized by the cases cited by the Movants. Accordingly, the Court concludes that the stay should be lifted to permit the New Jersey court

to determine whether the Debtor has a valid defense to the Movants' claims and whether the Movants' claims themselves have merit. Although the Movants presented no evidence with regard to the merits of their claim, in light of the fact that the remaining factors weigh in favor of lifting the automatic stay, the Court finds that the "cause" exists to lift the stay to permit this litigation to proceed and, therefore, the Court can and should annul the automatic stay retroactively to the date of the filing of the Movants' complaint in the state court.

CONCLUSION

For the reasons stated above, the Motion for Relief from the Automatic Stay, filed by Endesco Clean Harbors and St. Paul Fire and Marine Insurance Company is hereby **GRANTED**.

IT IS SO ORDERED.

At Newnan, Georgia, this _____ day of April, 2006.

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W. HOMER DRAKE, JR.
UNITED STATES BANKRUPTCY JUDGE